

90-36

Supreme Court, U.S.  
FILED

MAY 17 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

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NUMBER \_\_\_\_\_

EDWARD GOLDBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI  
TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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RICHARD D. GOLDMAN  
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Edward Goldberg  
1699 Coral Way, Suite 315  
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QUESTION PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT ERRED  
IN FAILING TO GRANT PETITIONER'S  
MOTION FOR SPECIFIC PERFORMANCE  
OF HIS PLEA AGREEMENT.



LIST OF PARTIES TO THE PROCEEDINGS

The parties to this proceeding  
are the UNITED STATES OF AMERICA and EDWARD  
GOLDBERG.



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### OPINION BELOW

A copy of the Eleventh Circuit Court of Appeals per Curiam, Affirmed, is attached hereto as Appendix I.

### BASIS OF JURISDICTION

The judgment giving rise to this Petition for a Writ of Certiorari was rendered March 12, 1990. Jurisdiction is invoked under Title 28, United States Code, Section 1254(1).



## STATEMENT OF THE CASE

On June 28, 1985, Edward Goldberg was charged with conspiracy to import cocaine, in violation of Title 21, U.S.C. §§952, 953. A superseding indictment which made no changes with respect to Petitioner was filed on October 25, 1985. On February 3, 1987, he pled guilty to Count I of the superseding indictment before the Honorable Edward B. Davis, United States District Judge, Southern District of Florida, sitting by designation. Petitioner was sentenced to fifteen years imprisonment on April 6, 1987. On August 3, 1987, Goldberg filed a motion for mitigation of sentence. On January 4, 1988, Petitioner filed an addendum to the motion for mitigation. This motion requested that the federal sentence be made concurrent and coterminous





with Petitioner's state sentence. On January 14, 1988, the court granted Petitioner's motion for mitigation, reducing the sentence to seven and one-half years, but after receiving the Government's motion opposing the relief sought in the addendum, the court, on April 15, 1988, denied Petitioner's addendum motion. On February 1, 1989, Goldberg filed a motion for specific performance of the plea agreement. This motion was denied on May 8, 1989. On June 19, 1989, Petitioner filed a motion for extension of time to file a notice of appeal and a notice of appeal. This motion was granted by the court. Petitioner has been continuously incarcerated since September 6, 1986.

On February 2, 1987, a jury had been selected in the case of United States v. Edward Goldberg. Petitioner was charged



with conspiracy to import cocaine into the United States, Count I of a four-count indictment.

On the evening of February 2, Petitioner was reviewing discovery which he received earlier in the day. One of the items was a plea agreement between Rostyslaw "Rusty" Kindratiw and the government (United States v. Kindratiw, et al, Southern District of Illinois, Criminal No. 85-40024).<sup>1</sup> Kindratiw and Petitioner were similarly situated with respect to the criminal charges against them. Each was charged in the Southern District of Illinois and by the State of Florida. In the Northern District of Florida, however, Kindratiw was an unindicted co-conspirator and a government witness against

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<sup>1</sup> See plea agreement attached as Appendix II to petition.



Petitioner.

The plea agreement Kindratiw had made with the Government was of particular interest to the Petitioner. The agreement resolved Kindratiw's state and federal charges, provided immunity for crimes which were known or became known to the Government as a result of his cooperation and, most importantly, permitted Kindratiw to serve his federal sentence concurrent to the state sentence and pursuant to the good and gain time provisions of the State of Florida. This type of sentence is frequently called "coterminous" and the benefit of such a sentence is that it would lower the actual time that Kindratiw would have to serve in prison. Petitioner, who had pending state charges against him, wanted to avail himself of the same benefits.

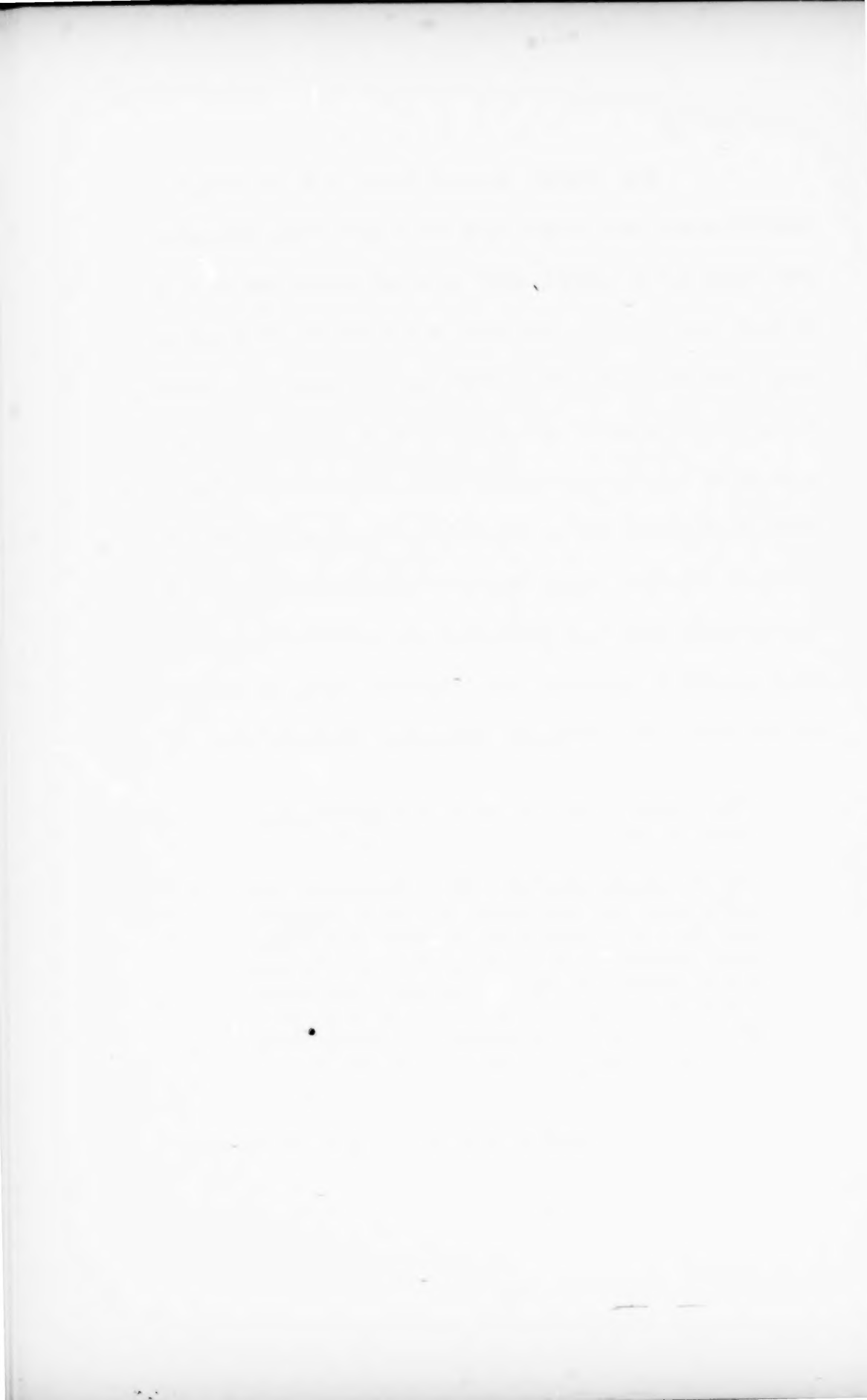


On the morning of trial, Petitioner met with his counsel and counsel for the Government and stated that he would plead guilty if he could receive the same deal as Kindratiw. The Government agreed to Petitioner's proposal and the parties entered the courtroom and announced that there would be a change of plea. As a result of the last minute discussions, the agreement was not reduced to writing. When the court asked if there was a plea agreement, Government counsel responded:

"We don't have one in writing,  
Your Honor.

As I understand, Mr. Taylor, we propose to outline on the record so it is clear for everybody what the terms are. Hopefully, later this week in Tallahassee [we can] reduce it to writing so Mr. Taylor could bring it back for Mr. Goldberg's ratification."

Both defense and government





counsel proceeded to inform the court about the terms of the agreement which was quite similar to the Kindratiw agreement. However, no mention was made regarding the service of the federal sentence pursuant to the good time and gain time provisions of the State of Florida. Unfortunately, the terms were never reduced to writing leaving Goldberg without the benefit of a document which spelled out the specifics of his plea bargain. The Petitioner bargained for the same benefits which were afforded to Kindratiw as a result of his plea agreement with the Government.

Since February 3, 1987, Petitioner has fulfilled his end of the bargain. He has given up his constitutional rights to a jury trial and he has cooperated with both state and federal authorities.



Petitioner has diligently pursued his claim that the agreement made with the prosecution envisioned a coterminous sentence.



## ARGUMENT

### ISSUE

WHETHER THE DISTRICT COURT ERRED  
IN FAILING TO GRANT PETITIONER'S  
MOTION FOR SPECIFIC PERFORMANCE  
OF HIS PLEA AGREEMENT.

Disputes arising over plea bargains must be analyzed according to the principles enunciated in Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 80 L.Ed.2d 427 (1971). Santobello holds that, when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. Santobello v. New York, 404 U.S. at 262, 92 S.Ct. at 499.

Although disputed plea agreements



are resolved according to contract principles, two other factors must be considered when conducting this analysis:

First, the defendant's underlying "contract" right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law. See Mabry v. Johnson, 467 U.S. 504, 509, 104 S.Ct. 2543, 2548 (1984) (broken government promise that induced guilty plea implicates due process clause because it impairs voluntariness and intelligence of plea). Second, with respect to federal prosecutions, the court's concerns run even wider than protection of the defendant's individual constitutional rights--to concerns for the "honor of the government, public confidence in the fair administration of justice, and the effective administration of disputes in the federal scheme of government." United States v. Carter, 455 F.2d 426, 426 (4th Cir. 1972).

United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986).

It is clear, therefore, that commercial contract principles are tempered





by constitutional and supervisory concerns which "require holding the government to a greater degree of responsibility than the defendant ... for imprecisions or ambiguities in plea agreements." Harvey, 791 at 300.

The Eleventh Circuit is in accord with this principle as reflected in the case of In Re: Arnett, 804 F.2d 1200 (11th Cir. 1986). In that case, the court made clear that the government is to be held to a higher standard when the terms of a plea agreement are in dispute. It went on to adopt cases from other circuits which support this principle. Id. at 1203 (citing United States v. Bowler, 585 F.2d 851, 854 (7th Cir. 1978) "The plea agreement is not an appropriate context for the government to resort to a rigidly literal approach in the construction of language." See, e.g.



United States v. Harvey, 791 F.2d 294, 303 (4th Cir. 1986) (ambiguous plea agreement "must be read" against the government); United States v. Crusco, 536 F.2d 21, 26 (3rd Cir. 1976) ("strict and narrow interpretation of government's commitment is untenable"); Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1978) (government must be held to "most meticulous standards of both promise and purpose") ).

Analysis of claims of broken plea bargains require the court to decide "whether the government's actions are inconsistent with what the defendant reasonably understood when he entered his guilty plea." In Re: Arnett, 804 F.2d 1200, 1203 (11th Cir. 1986) (citing Johnson v. Beto, 466 F.2d 478, 480 (5th Cir. 1972)).



Petitioner was induced to plead guilty based on his understanding and the prosecutor's agreement that the federal sentence would be served concurrently with and pursuant to the good and gain time provisions of the State of Florida. This type of sentence would provide Petitioner with more gain time than the federal system and would reduce his actual time in prison. Prior to negotiating his agreement with the Government, Petitioner reviewed the plea agreement of Rotyslaw "Rusty" Kindratiw, a co-defendant of Petitioner in a case from the Southern District of Illinois. Kindratiw's agreement specifically provided that any federal sentence would be served concurrent to and with the benefits of the State of Florida good time provisions applying to the federal sentence. It was exactly this type of sentence which



Goldberg bargained for and which the Government agreed to, that served as the basis for his guilty plea.

It cannot be said that Petitioner's claim for coterminous time is a recent assertion or that he has not been diligent in pursuing this claim. It has been raised in Petitioner's motion for mitigation of sentence, the addendum to that motion, and a motion for specific performance of the plea agreement.

Goldberg has acted in good faith, not only by pleading guilty, but by his cooperation with law enforcement authorities. This is evidenced by letters appended to Petitioner's initial motion for mitigation.

Failure to reduce the agreement





to writing is a significant source of confusion with respect to this case.

In denying the Petitioner's motion for specific performance, the court stated that even if the Government recommended a coterminous sentence, the court would deny such a recommendation. Had the agreement been reduced to writing with all the terms spelled out, the Petitioner would have had the benefit of the court rejecting the agreement that day and Petitioner could have elected to go to trial.

"When a defendant pleads guilty on the basis of a promise by his defense attorney or the prosecutor, whether or not such promise is fulfillable, breach of that promise taints his plea."

McKenzie v. Wainwright, 632 F.2d 649, 651 (5th Cir. Unit B 1980).

A guilty plea involves the



waiving of substantial constitutional rights and a defendant must enter such a plea voluntarily, knowingly and intelligently. He must be sufficiently aware of the consequences of his guilty plea. See Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970). In the present case, the Petitioner's guilty plea was extracted based on his belief that coterminous time would be part of the agreement.

Two remedies are available if the Government breaches its plea agreement. It is within the discretion of the court to order specific performance of the plea agreement or to allow the Petitioner to withdraw his guilty plea. Santobello, 404 U.S. at 263; Arnett, 804 at 1204. In this case withdrawal is neither practical nor just because the Petitioner has been



incarcerated since September 6, 1986, and he has cooperated extensively with the Government. Specific performance is the only correct alternative.

The Government contends that a sentence pursuant to the good and gain time provisions of the State of Florida was never part of the agreement. Petitioner claims that the Government agreed to such a sentence. The dictates of Arnett, 804 F.2d at 1203, require the court to construe ambiguities against the Government and in favor of a defendant's reasonable understanding when he entered his guilty plea. The court should order specific performance and resentencing before a different judge.

Petitioner recognizes that the "existence of a plea bargain is a factual issue." United States v. Cain, 587 F.2d



678 (5th Cir. 1979). See DeMarco v. United States, 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974). If the court finds that there is a genuine factual dispute, it can order an evidentiary hearing. The Supreme Court has held that a defendant, "alleging a breach of his plea bargain is entitled to discovery or to an evidentiary hearing as to the veracity of his allegations." Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621. The sole exception to this requirement is where such allegations are so 'palpably incredible', Blackledge, 431 U.S. at 76, 97 S.Ct. at 1630, as to justify summary dismissal. The facts at bar and the allegations made by Petitioner cannot be considered so palpably incredible that he is not entitled to an evidentiary hearing. At a minimum, the ends of justice require the court to grant Goldberg an evidentiary hearing on this

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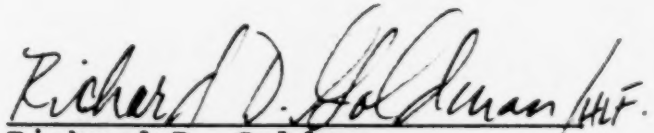


matter.

CONCLUSION

Based on the foregoing argument and authority, Edward Goldberg asserts that the Court should order specific performance of the plea agreement as he understood it to be, or, in the alternative, order an evidentiary hearing in order to resolve the disputed issues of fact.

Respectfully submitted,

 *Richard D. Goldman/HLF.*

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## **APPENDIX I**



IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 89-3696  
Non-Argument Calendar

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D.C. Docket No. 85-14

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ED GOLDBERG,

Defendant-Appellant.

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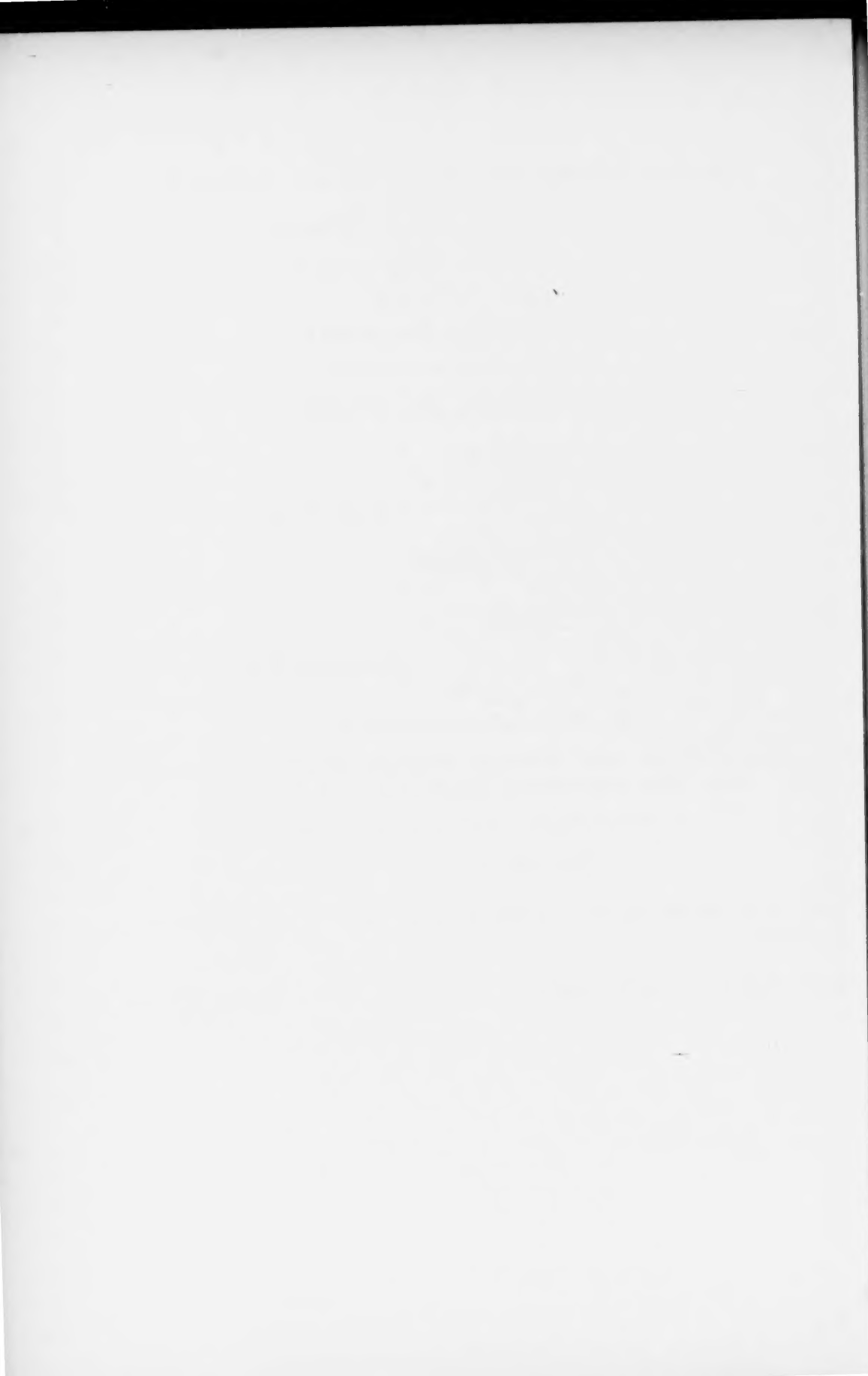
Appeal from the United States District Court  
for the Northern District of Florida

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(March 12, 1990)

Before HATCHETT, EDMONDSON and COX, Circuit  
Judges.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.



## **APPENDIX II**





IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Criminal No. 85-40024
	)	
ROSTYSLAW KINDRATIW,	)	
Rusty,	)	
	)	
Defendant.	)	

PLEA AGREEMENT

WHEREAS, the Grand Jury for the Southern District of Illinois has been and is currently conducting investigations of Titles 18, 21, 26 and 31 of the United States Code, in the Southern District of Illinois and elsewhere, and,

WHEREAS, it has come to the attention of the Department of Justice and the United States Attorney for the Southern District of Illinois that ROSTYSLAW KINDRATIW may be involved in the commission of some or all of the aforesaid violations, and,



WHEREAS, it has further come to the attention of the Department of Justice and the United States Attorney for the Southern District of Illinois that ROSTYSLAW KINDRATIW may have information of benefit to the Grand Jury and the United States, and

WHEREAS, in reliance on the representations, facts and matters hereinabove stated, ROSTYSLAW KINDRATIW has indicated a willingness to cooperate fully with the Grand Jury for the Southern District of Illinois and the United States in the investigation and prosecution of the aforesaid violations, and,

WHEREAS, ROSTYSLAW KINDRATIW is desirous of entering into a Plea Agreement with the United States as a means of disposing of his criminal liability and the United States is desirous of entering into the same as a means of procuring information of benefit to the government.

NOW, THEREFORE, in consideration of all



the aforesaid representations, facts and matters hereinabove stated, the United States of America and ROSTYSLAW KINDRATIW mutually agree as follows:

1. ROSTYSLAW KINDRATIW will cooperate fully with the United States by testifying before the Grand Jury or at the trial of any cause in any Federal District Court and will give testimony or information to any Federal or State law enforcement agencies as directed by the Department of Justice or the Office of the United States Attorney for the Southern District of Illinois. ROSTYSLAW KINDRATIW understands and agrees that his cooperation extends to the giving of information and testimony throughout and up to the completion of any investigation and trial in which his information and testimony are deemed relevant, material, and necessary in the discretion of the government. ROSTYSLAW KINDRATIW understands and agrees that his



failure or opposition in complying with this provision may be considered, in the discretion of the government, as sufficient grounds to give notice of the termination of this Agreement, as more fully set forth in paragraph 11.

2. ROSTYSLAW KINDRATIW will give full, complete and truthful testimony or information concerning the aforesaid violations and will do all things necessary to effect the seizure by the United States of any and all assets or proceeds used, maintained or acquired in violation of 18 U.S.C. §1962, 21 U.S.C. §§853 or 881, and other forfeiture statutory provisions as directed by the Department of Justice, United States Attorney for the Southern District of Illinois or any other districts.

3. ROSTYSLAW KINDRATIW agrees that he will enter pleas of guilty in the Southern District of Illinois to the following





offenses:

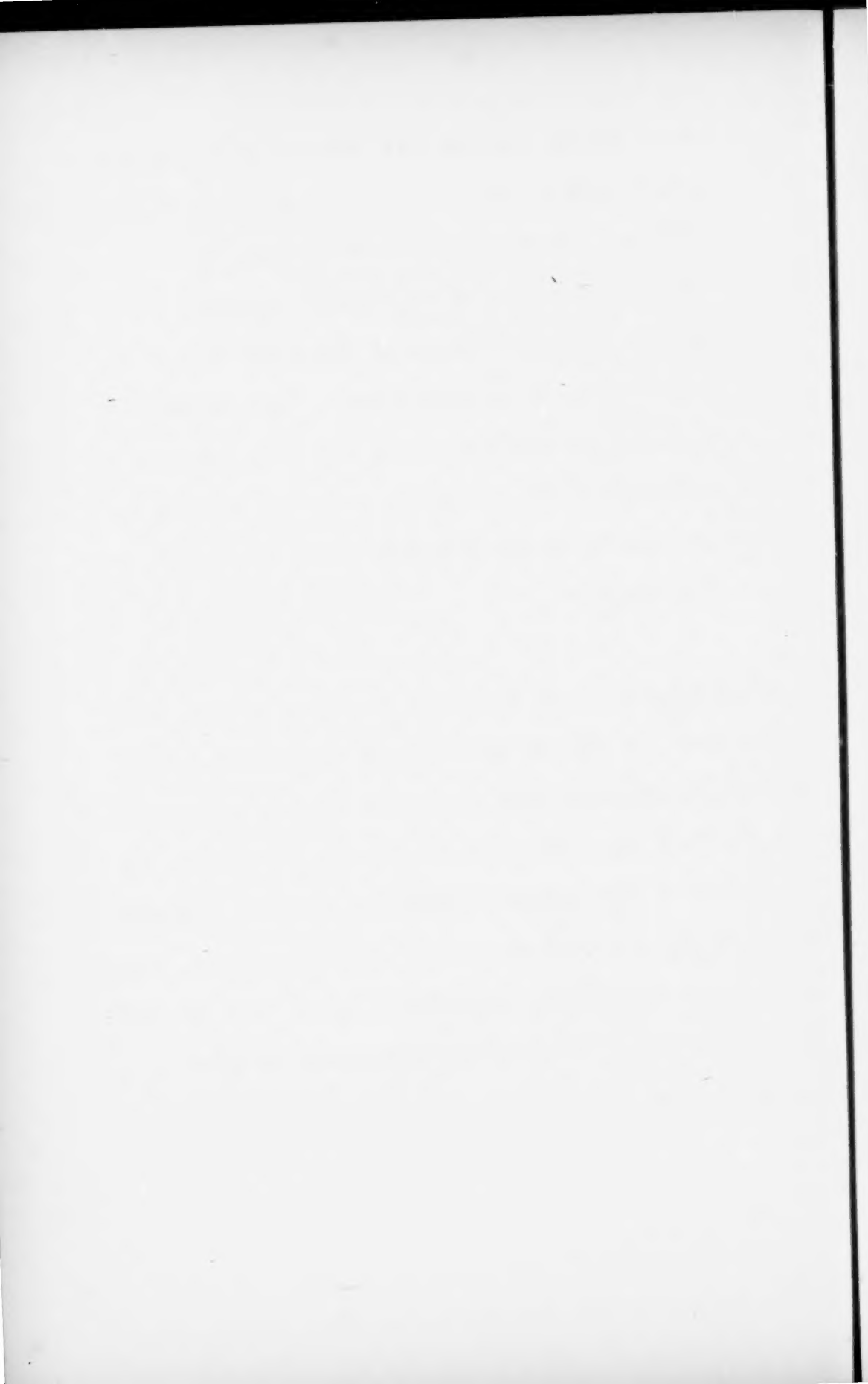
(a) Continuing Criminal Enterprise (CCE), in violation of Title 21, United States Code, Section 848, wherein the penalty is a term of imprisonment not less than 10 years up to life imprisonment, a fine of not more than \$100,000, and to forfeiture as prescribed in Title 21, United States Code, Section 853.

(b) Causing and aiding interstate travel with the intent to distribute the proceeds of an unlawful business enterprise involving controlled substances, in violation of Title 18, United States Code, Section 1952, wherein the maximum penalty is 5 years imprisonment and a \$10,000 fine.



(c) False Income Tax Return for the tax year 1980, in violation of Title 26, United States Code, Section 7206(1), which carries a maximum penalty of 3 years imprisonment, a fine of \$10,000, and costs of prosecution. The defendant agrees to waive venue in the Southern District of Florida and to agree to prosecution in the Southern District of Illinois.

The United States states that the offenses to which ROSTYSLAW KINDRATIW will plead, encompass the entirety of the offenses committed by him in the Southern District of Illinois. ROSTYSLAW KINDRATIW further agrees that this Plea Agreement incorporates by reference his Plea Agreement with the State of Florida. ROSTYSLAW KINDRATIW further understands and agrees that an agreement has been made with the Northern District of



Florida, wherein the Northern District of Florida will forego all prosecution of ROSTYSLAW KINDRATIW for offenses committed in that District so long as ROSTYSLAW KINDRATIW is in total compliance with his Plea Agreements as to the State of Florida and the Southern District of Illinois.

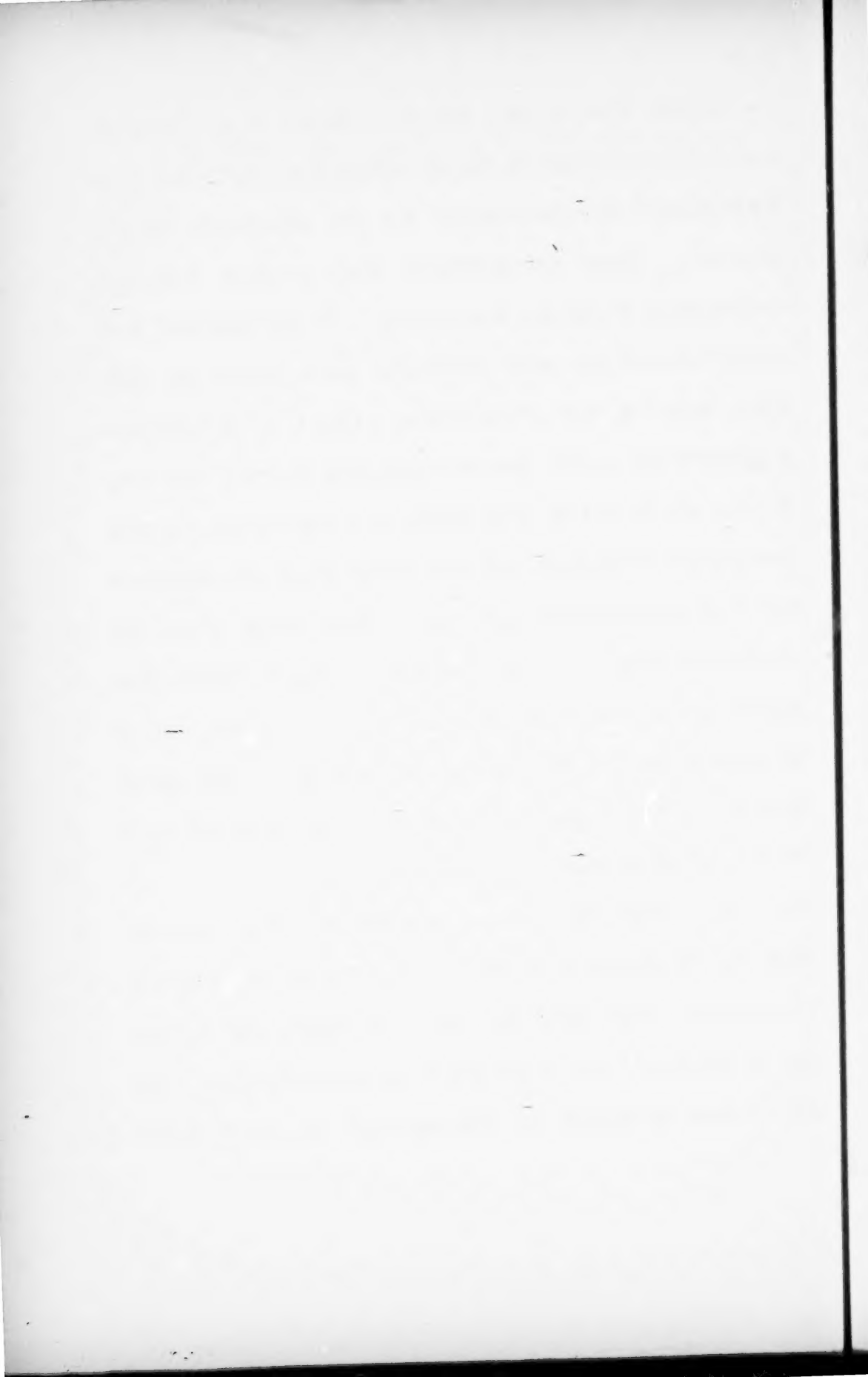
It is understood and agreed by all parties that ROSTYSLAW KINDRATIW will provide complete, truthful, and full information and testimony as to Sharon W. Gregory's involvement, knowledge and participation, who has also agreed to cooperate and testify.

4. The United States will recommend that the Court impose a sentence not exceeding 20 years imprisonment without parole upon the CCE offense, 5 years imprisonment upon the ITAR offense, and 3 years imprisonment upon the false income tax return offense, each to be served concurrently with each other. The Government



reserves the right to recommend a different disposition upon each offense wherein the maximum imprisonment to be imposed is 20 years. The defendant may argue for an recommend a lower sentence. It is agreed and understood by and between both parties and the State of Florida, that ROSTYSLAW KINDRATIW will be sentenced first in the State of Florida and that his sentence in the Southern District of Illinois will be ordered to run concurrently (provided said Florida sentence shall be 15 years or more) with the sentence in the State of Florida, and sentence is to be served pursuant to the good and gain time provisions of the laws of the State of Florida.

5. The defendant agrees not to contest the forfeiture and seizure of his assets or proceeds used, maintained, or required by or as a result of his participation in the offenses stated in paragraph 3, and will





assist the Government and the State of Florida in the forfeiture and seizure of such. The following is a list of such assets or proceeds:

- (a) all bank accounts, wherever located.
- (b) contents of all safes and safe deposits boxes, wherever located.
- (c) all real properties, including inventory, wherever located.
- (d) all horses, wherever located, except for those previously assigned.
- (e) all boats, vehicles, airplanes, or other mechanized means of conveyance, wherever located.
- (f) all monies, money equivalents (i.e. certificates of deposit), stocks, bonds, and partnerships or business interests wherever located.
- (g) All other assets or property (real

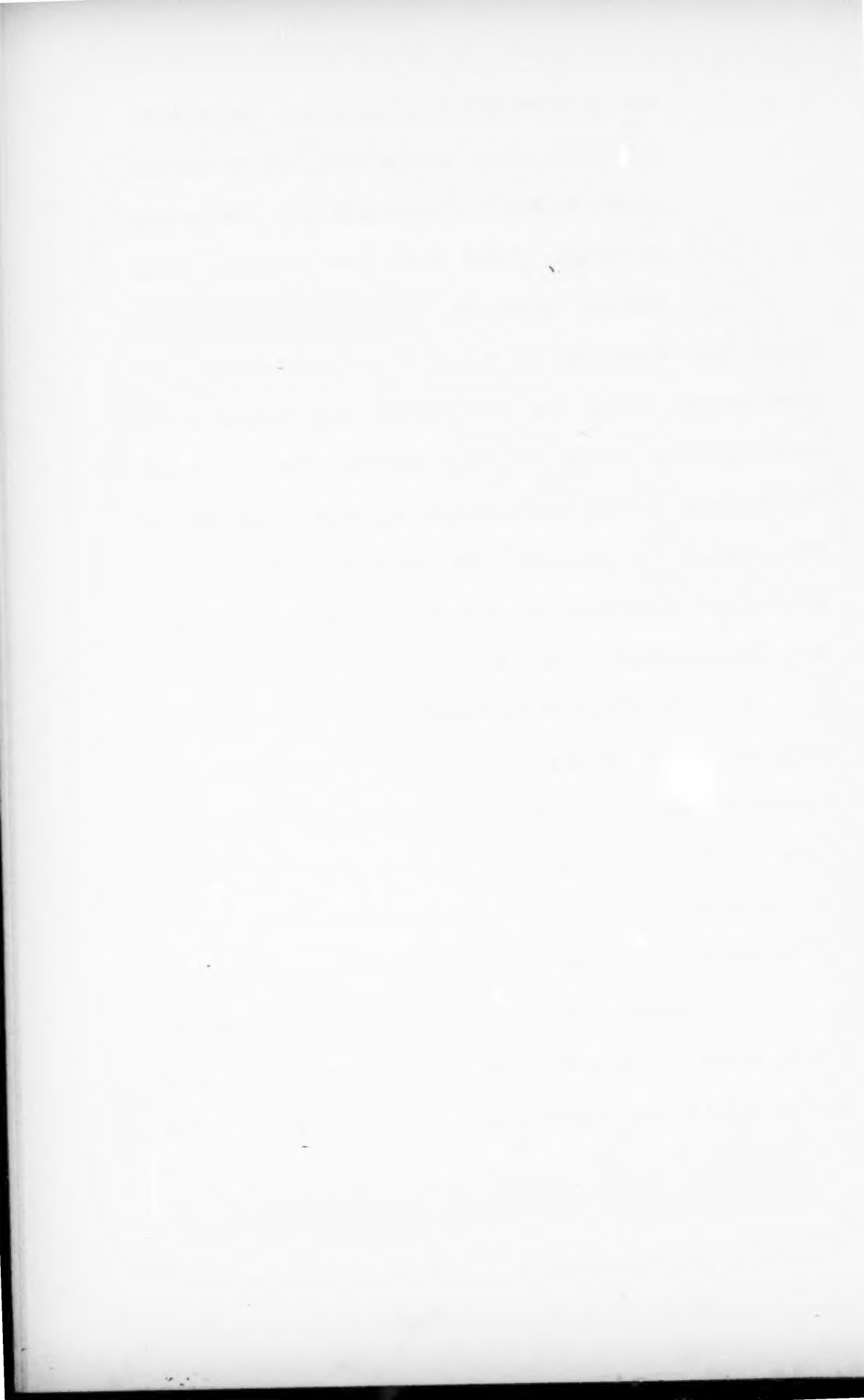


or personal) wherever located, except for personal furniture presently located at Safeway Storage, 3090 N.W. 2nd Avenue, Boca Raton, Florida.

Upon the signing of this Plea Agreement, an addendum will be attached particularly describing each of the above items to be forfeited. The defendant agrees that he is obligated to assist the Government and the State of Florida in identifying, locating, and describing these assets in proceeds.

6. ROSTYSLAW KINDRATIW agrees that his cooperation shall include complete and truthful statements or interviews with any law enforcement official conducting investigations of the criminal activity known to ROSTYSLAW KINDRATIW.

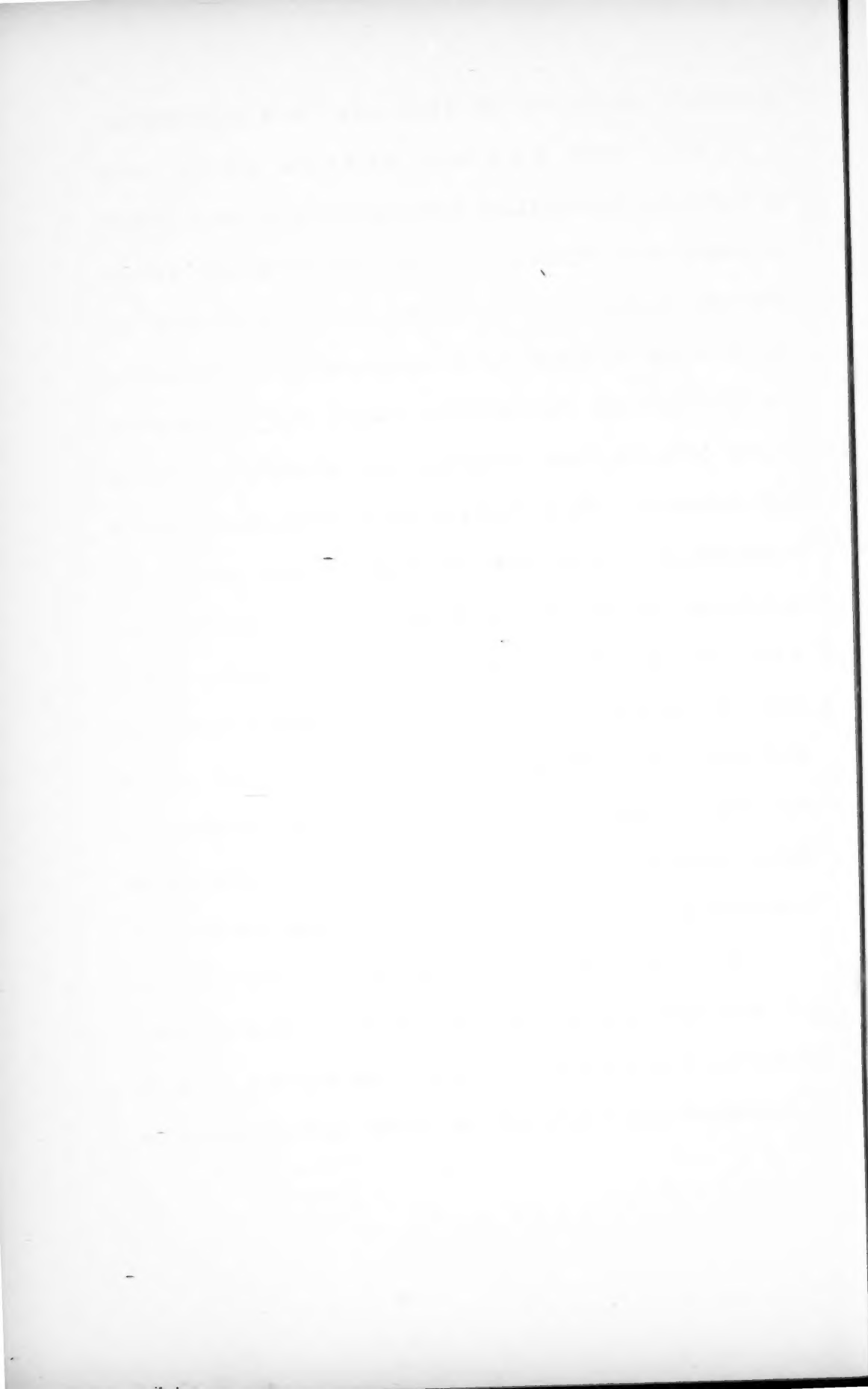
7. ROSTYSLAW KINDRATIW further agrees that his cooperation is to include all knowledge of criminal activity in the



Southern District of Illinois, and elsewhere.

8. The United States will not prosecute ROSTYSLAW KINDRATIW for any other crimes now known to the government or to become known to the government by virtue of ROSTYSLAW KINDRATIW's cooperation; however, if ROSTYSLAW KINDRATIW fails to cooperate with the United States, as stated in this Agreement, and therefore breaches this Agreement, then the United States shall be entitled to prosecute ROSTYSLAW KINDRATIW for any of such other crimes, and, any incriminating testimony or statement made by ROSTYSLAW KINDRATIW as a result of this Agreement may be used by the United States in developing said prosecutions of ROSTYSLAW KINDRATIW through other independent evidence.

9. In conjunction with the provisions of Paragraph 8 hereinabove, ROSTYSLAW KINDRATIW specifically agrees and acknowledges that if he does not cooperate



fully or does not testify truthfully before the Grand Jury or at any trial in any federal district where he is called by the United States as a witness, then he is subject to full prosecution and punishment for each of the offenses to which he is agreeing to plead guilty herein.

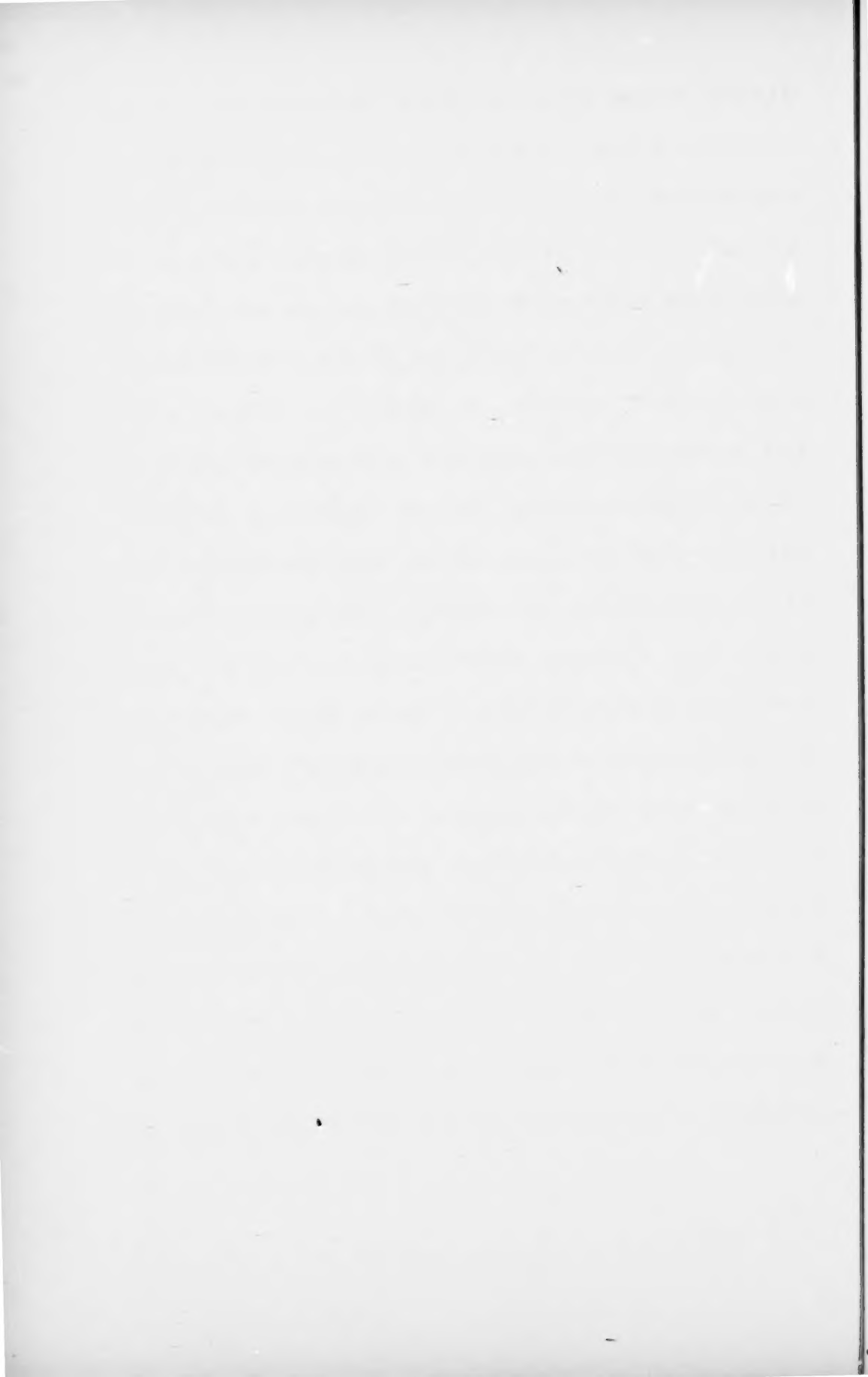
10. In further conjunction with the provisions of Paragraphs 8 and 9, the United States agrees that no testimony or other incriminating information given by ROSTYSLAW KINDRATIW, pursuant to the terms of this Plea Agreement, may be used directly against ROSTYSLAW KINDRATIW in such subsequent criminal cases; except a prosecution of ROSTYSLAW KINDRATIW for perjury or giving a false statement arising from his testimony.

11. In the event that the United States determines that ROSTYSLAW KINDRATIW has deliberately failed to comply with the terms of this Agreement by testifying falsely,





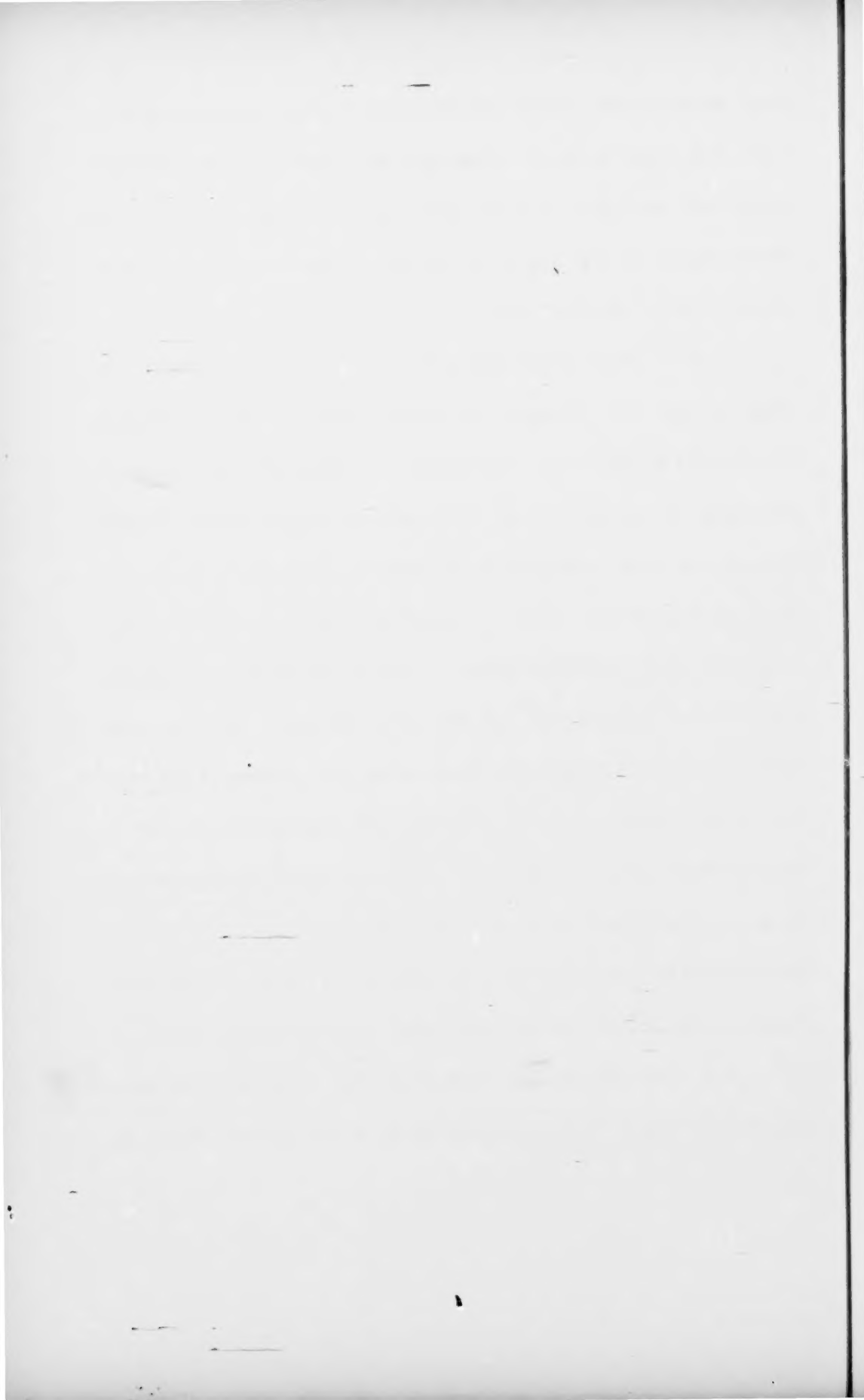
giving false or untruthful information, or by withholding testimony or information requested that is material to any criminal investigation, the United States will give ROSTYSLAW KINDRATIW written notice of failure to comply and he will be given a reasonable time, after notice, in which to comply with the agreement or correct any misinformation or misunderstanding, there remains a dispute between the parties as to the existence, in fact, of failure to comply, the parties agree that the United States Attorney of the Southern District of Illinois shall make the determination as to whether or not there has been a failure to comply with the terms of this Agreement. After determination of a failure to comply with the terms of this Agreement, the government will then be relieved from all provisions of this Agreement and shall be free to institute criminal proceedings as to any violations of



any statutes that have not been prosecuted. And in the event the government institutes new or other criminal proceedings, the defendant will be relieved of all obligations under this Agreement.

12. The United States agrees that at the time of final sentencing of ROSTYSLAW KINDRATIW on the offense to which he hereby pleads guilty, the United States will make known to the sentencing court the full extent and nature of the cooperation provided by ROSTYSLAW KINDRATIW. The United States further agrees that it shall give to ROSTYSLAW KINDRATIW and his attorney, prior to the sentencing date, government's representation of the extent and nature of the cooperation provided by ROSTYSLAW KINDRATIW in order to resolve any dispute regarding such prior to the sentencing date.

13. ROSTYSLAW KINDRATIW acknowledges that he has been advised and does fully



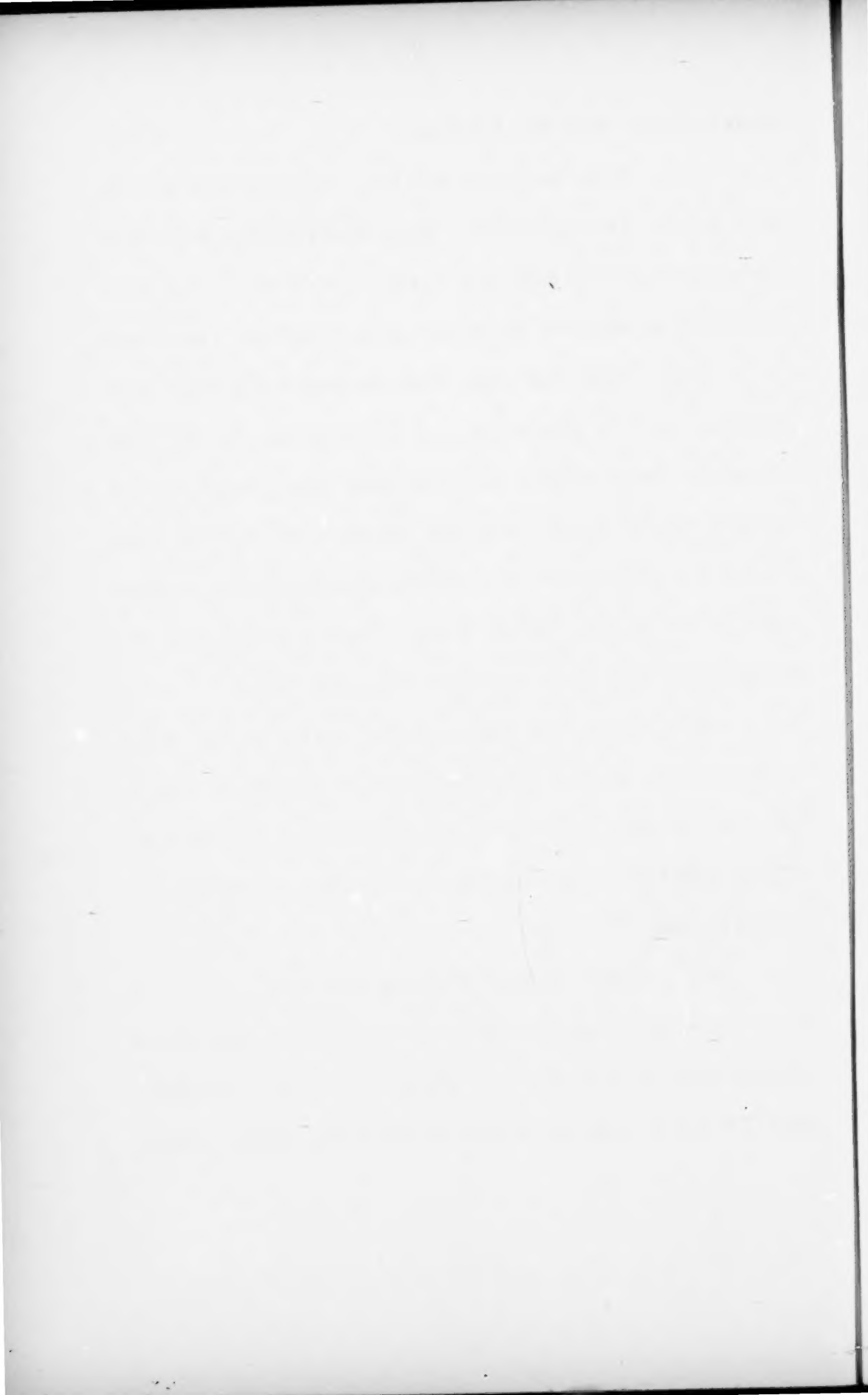
understand the following:

(a) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(b) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself, and

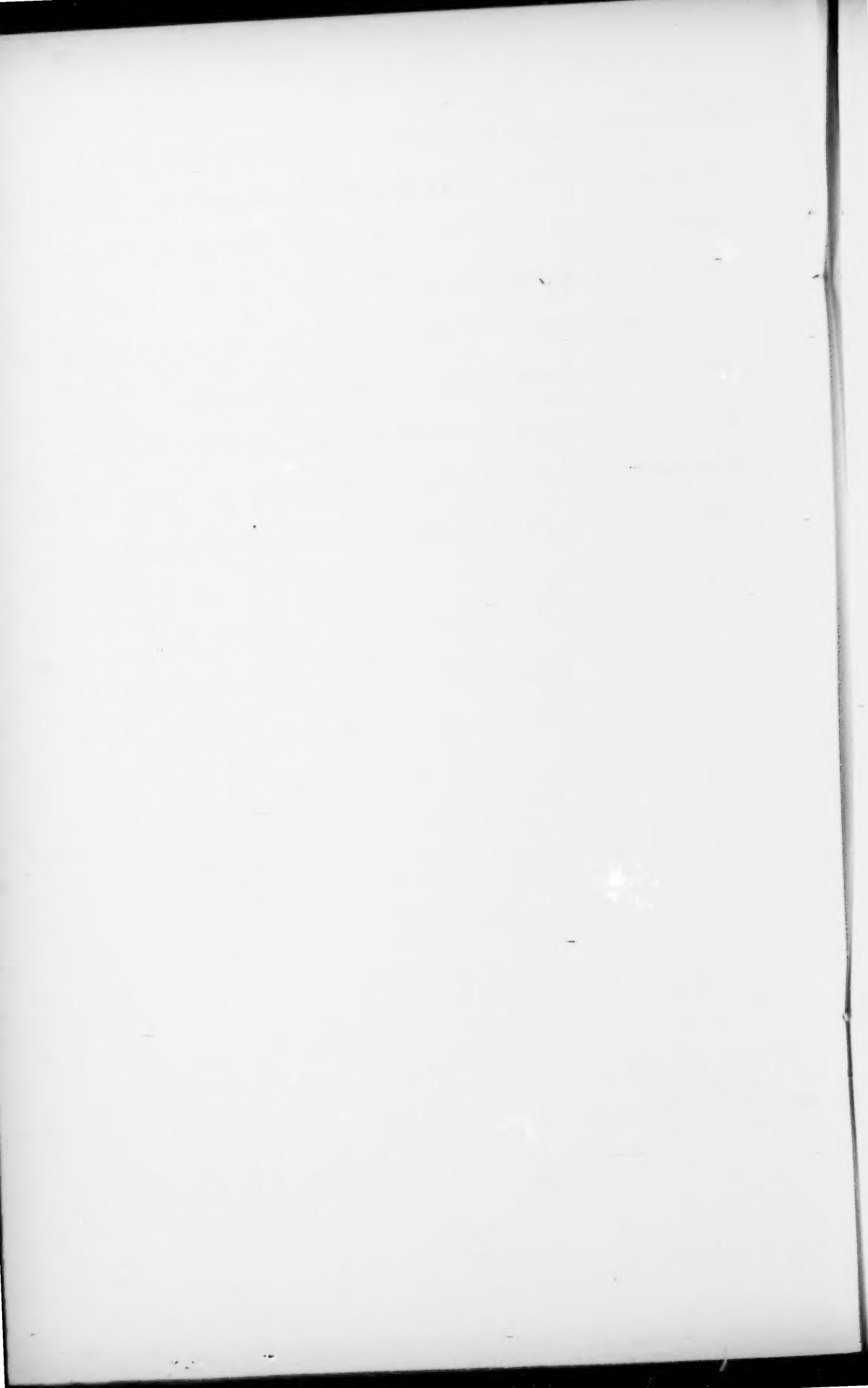
(c) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere, he waives the right to a trial; and

(d) that if he pleads guilty or nolo contendere, the Court may ask him questions about the offenses to which he has pleaded, and if he answers these questions under oath,



on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement; and

(e) that if he pleads guilty, he will waive his right to persist in his plea of not guilty, to be tried by a jury, to have assistance of counsel at the trial, and to confront and cross-examine witnesses against him at trial.





FOR THE DEFENDANT

[Signature on original]

Executed at East St. Louis, Ill on 3  
June, 1985.

WITNESS [Signature on original]

FOR THE UNITED STATES

[Signature on original]

MARSHA L. JOHNSON  
Assistant U.S. Attorney  
750 Missouri Avenue  
East St. Louis, IL 62201  
(618) 274-2200, Ext. 361